

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

WILLIE SAMPSON,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:11-cv-00019-LRH-WGC

**ORDER**

This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner represented by counsel. This matter comes before the Court on petitioner's motion for reconsideration (ECF No. 78) and on the merits of the amended petition.

**I. Procedural History**

**A. Trial and Direct Appeal**

On March 25, 2002, petitioner was charged with first-degree kidnapping with the use of a deadly weapon, two counts of lewdness with a minor under fourteen with the use of a deadly weapon, attempted sexual assault with a minor under fourteen with the use of a deadly weapon, sexual assault with a minor under fourteen with the use of a deadly weapon, and possession of a firearm by an ex-felon. (Exhibit 7).<sup>1</sup> An amended information was filed on January 16, 2003,

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<sup>1</sup> The exhibits referenced in this order are found in the Court's record at ECF Nos. 10-16 (Exhibits 1-178) and ECF Nos. 45-46 (Exhibits 179-241).

1 containing the original charges and including the names of witnesses then known to the prosecution.  
2 (Exhibit 35). A second amended information was filed on March 18, 2003, omitting count six, the  
3 felon in possession of a firearm charge. (Exhibit 44).

4 On March 28, 2003, petitioner was convicted by a jury of all five counts, with the exception  
5 that the jury found that none of the crimes were committed with a deadly weapon. (Exhibit 56). On  
6 April 10, 2003, a third amended information was filed in open court charging petitioner with  
7 possession of a firearm by an ex-felon. (Exhibit 59). Petitioner agreed to plead guilty to that charge  
8 and a plea agreement was filed. (Exhibit 60). Thereafter, petitioner was sentenced on each count,  
9 accruing a term of life with the possibility of parole after twenty years on the sexual assault with a  
10 minor under fourteen (count five) as his harshest sentence, to run concurrent to the terms imposed for  
11 counts one through four. (Exhibit 67). The sentence on count six, felon in possession of a firearm, a  
12 term of twelve to forty-eight months, was to run consecutive to the other sentences *Id.*

13 Petitioner filed a direct appeal raising three claims for relief. (Exhibit 68). Petitioner's  
14 opening brief was filed on October 14, 2004. (Exhibit 95). On December 1, 2005, the Nevada  
15 Supreme Court affirmed petitioner's convictions. (Exhibit 100).

#### 16 **B. Post-Conviction State Habeas Review**

17 On October 11, 2006, petitioner filed his original state post-conviction petition for writ of  
18 habeas corpus. (Exhibit 102). Without holding an evidentiary hearing, the state district court denied  
19 the petition on January 8, 2007. (Exhibit 105). On appeal, by order filed October 31, 2007, the  
20 Nevada Supreme Court remanded the matter to the state district court for an evidentiary hearing to  
21 determine whether trial counsel's failure to include expert testimony on the victim's oppositional  
22 defiant disorder (ODD) prejudiced petitioner. (Exhibit 126). On remand and with the assistance of  
23 counsel, an evidentiary hearing on the petition was conducted on June 16, 2008. (Exhibit 144).  
24 Following the evidentiary hearing, the petition was again denied. (Exhibit 161). On appeal,  
25 petitioner raised the claim that his trial counsel was ineffective for failing to present expert testimony  
26

1 on the victim's oppositional defiant disorder. (Exhibit 165). The denial of the petition was affirmed  
2 on December 10, 2010. (Exhibit 171). Remittitur issued on January 5, 2011. (Exhibit 172).

3 On January 7, 2011, petitioner filed a second state post-conviction petition. (Exhibit 174).  
4 The state district court denied the petition on procedural grounds. (Exhibit 202). Petitioner  
5 appealed, and the appeal was denied on October 5, 2011, when the Nevada Supreme Court  
6 determined the petition was untimely, successive, and an abuse of the writ. (Exhibit 214). The  
7 Nevada Supreme Court determined that petitioner could not make the requisite showing of cause and  
8 prejudice to overcome the procedural bars. *Id.* Although the Nevada Supreme Court fully affirmed  
9 the lower court's decision, it remanded the matter to permit the district court to correct a  
10 typographical error. *Id.* Remittitur issued in that proceeding on November 1, 2011. (Exhibit 215).  
11 The state district court entered an amended judgment of conviction on December 30, 2011. (Exhibit  
12 224).

### 13 **C. Federal Habeas Corpus Proceedings**

14 The federal proceedings were commenced when petitioner gave his original federal habeas  
15 petition to prison officials for mailing on January 8, 2011. (ECF No. 4). A motion to dismiss that  
16 petition was filed May 5, 2011. (ECF. No. 9). The motion was denied without prejudice and  
17 counsel was appointed to assist the petitioner in preparing and filing an amended petition. (ECF No.  
18 33). An amended petition was filed by petitioner's counsel on January 10, 2013. (ECF. No. 44).  
19 The amended petition raises the following grounds for relief:

- 20 I. Sampson was denied his right to due process, to present a defense,  
21 to a fair trial, and to confront the witnesses against him under the  
22 Fifth, Sixth, and Fourteenth Amendments to the United States  
23 Constitution when the court precluded the defense from  
24 introducing evidence that the complainant suffered with a mental  
25 disorder that could adversely affect his ability to tell the truth.
- 26 II. Sampson was denied his right to due process, to present a defense,  
and to a fair trial under the Fifth, Sixth and Fourteenth  
Amendments to the United States Constitution when the court  
precluded expert testimony from Dr. Racoma that the complainant  
had been diagnosed with a mental disorder that could adversely  
affect his ability to tell the truth.

1           III. Sampson was denied his right to due process and a fair trial under  
2           the Fifth, Sixth, and Fourteenth amendments to the United States  
3           Constitution when the prosecutor repeatedly elicited testimony that  
            Sampson had invoked his constitutional right not to consent to a  
            warrantless search.

4           IV. Sampson was denied his right to due process and a fair trial under  
5           the Fifth, Sixth, and Fourteenth Amendments to the United States  
6           Constitution when a police officer testified that Sampson had  
            invoked his constitutional rights to remain silent and to an attorney.

7           V. Sampson was denied his right to the effective assistance of counsel  
8           under the Sixth and Fourteenth Amendments to the United States  
9           Constitution when his attorney failed to include Dr. Racoma as an  
            expert witness at trial to testify about oppositional defiant disorder,  
            that is characterized by lying.

10          VI. Sampson was denied his due process and equal protection rights to  
11          a timely appeal and his right to the effective assistance of appellate  
12          counsel under the Fifth, Sixth and Fourteenth Amendments to the  
13          United States Constitution when appellate counsel, flagrantly  
            ignoring applicable rules and court orders, delayed over sixteen  
            months without conferring with their client as to any aspect of the  
            appeal before filing a brief, because of the public defender office's  
            admitted incapacity to perform effective appellate legal work of its  
            indigent clients.

14 (ECF No. 44).

15           Respondents moved to dismiss the amended petition, claiming that it is unauthorized because  
16           the petitioner has refused to sign the verification, that it contained duplicative claims, and that  
17           Ground Six is procedurally barred. (ECF No. 53). By order filed September 3, 2013, this Court  
18           granted the motion insofar as it dismissed Ground Two as duplicative, but required respondents to  
19           address the claim that petitioner was denied a fair trial because he was prevented from presenting the  
20           expert testimony of Dr. Racoma, as part of Ground One. (ECF No. 67). The Court dismissed  
21           Ground Six as procedurally barred. (*Id.*). The Court allowed the remaining grounds of the amended  
22           petition to proceed and directed respondents to file an answer to the remaining grounds. (*Id.*).

23           On November 25, 2013, petitioner filed a *pro se* notice of appeal. (ECF No. 75). This Court  
24           previously instructed petitioner not to file *pro se* documents because he is represented by counsel.  
25           On October 22, 2013, this Court ordered the Clerk of Court not to accept any further *pro se*  
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1 documents from petitioner in this action. (ECF No. 74). On January 15, 2014, the Ninth Circuit  
2 Court of Appeals dismissed the *pro se* appeal for lack of jurisdiction. (ECF No. 84).

3 On November 26, 2013, respondents filed an answer to Grounds 1, 3, 4, and 5 of the  
4 amended petition. (ECF No. 77). On December 10, 2013, through counsel, petitioner filed a motion  
5 for reconsideration of the order finding Ground Six of the amended petition procedurally barred.  
6 (ECF No. 78). Respondents opposed petitioner's motion. (ECF No. 79). Petitioner did not file a  
7 reply regarding the motion for reconsideration. Petitioner did file a reply to the answer. (ECF No.  
8 85).

## 9 **II. Petitioner's Motion for Reconsideration (ECF No. 78)**

10 On December 10, 2013, petitioner filed a motion for reconsideration of this Court's finding  
11 that Ground Six of the amended petition is procedurally barred. (ECF No. 78). Petitioner bases the  
12 motion for reconsideration on an intervening change in controlling law, specifically, the Ninth  
13 Circuit's opinion in *Nguyen v. Curry*, 736 F.3d 1287 (9<sup>th</sup> Cir. 2013), which was filed on December 4,  
14 2013.

### 15 **A. Court's Prior Ruling that Ground Six is Procedurally Barred**

16 In Ground Six, petitioner alleges the ineffective assistance of appellate counsel. (ECF No.  
17 44, at pp. 44-52). In the motion to dismiss, respondents argued that Ground Six of the amended  
18 petition was procedurally defaulted in the state courts because it was raised for the first time in the  
19 second post-conviction proceedings and those proceedings were terminated on procedural grounds as  
20 untimely, abuse of the writ, and laches. (Exhibit 214).

21 Petitioner did not dispute that the Nevada Supreme Court found the claim in Ground Six to  
22 be procedurally defaulted. Petitioner made no challenge to the adequacy or independence of the  
23 Nevada Supreme Court's application of the procedural default rules. Rather, petitioner argued that  
24 he could show cause to overcome the procedural default. He contended that his court-appointed  
25 post-conviction counsel acted ineffectively in representing him. Petitioner argued that under the  
26 United States Supreme Court's recent decision in *Martinez v. Ryan*, 132 S.Ct. 130 (2012), because of

1 the ineffective representation of his post-conviction counsel, the procedural bar to Ground Six can be  
2 overcome.

3 In the order filed September 3, 2013, this Court noted that, under the holding of *Martinez v.*  
4 *Ryan*, 132 S.Ct. 1309 (2012), failure of a court to appoint counsel, or the ineffective assistance of  
5 counsel in a state post-conviction proceeding may establish cause to overcome a procedural default  
6 in specific, narrowly defined circumstances. Although reaffirming the general holding of *Coleman*,  
7 “that an attorney’s *negligence* in a postconviction proceedings does not establish cause” in all *other*  
8 circumstances, the United States Supreme Court determined that a narrowly carved exception – an  
9 equitable rule – must be established. *Martinez*, 132 S.Ct. at 1320 (quoting *Coleman*, 501 U.S. at  
10 753) (emphasis added). The Court in *Martinez* held:

11 Where, under state law, claims of ineffective assistance of *trial*  
12 *counsel* must be raised in an initial-review collateral proceeding, a  
13 procedural default will not bar a federal habeas court from hearing a  
14 substantial claim of ineffective assistance at trial if, in the  
15 initial-review collateral proceeding, there was no counsel or counsel  
16 in that proceeding was ineffective.

17 132 S.Ct. 1320 (emphasis added). The Court specifically determined that this new rule does not  
18 “extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to  
19 raise a claim of ineffective assistance at trial.” *Id.*

20 Petitioner previously argued that *Martinez* should be expanded to cover not only claims of  
21 ineffective assistance of trial counsel, but also claims of ineffective assistance of appellate counsel,  
22 relying on Justice Scalia’s dissent, where he recognized that claims such as petitioner’s Ground Six  
23 would fall within the majority’s rationale for the exception, i.e., that post-conviction is the first  
24 instance where any claims of ineffective counsel can be raised, including claims related to the  
25 performance of appellate counsel. *See Martinez*, 132 S.Ct. at 1321 (Scalia, J., dissenting). This  
26 Court rejected petitioner’s invitation to expand the holding of *Martinez*, as follows:

The United States Supreme Court was explicit in its holding that the  
exception allowed to *Martinez* was a narrow exception which applied  
only to procedurally defaulted claims of ineffective assistance of *trial*

counsel. *Id.* at 1320. Given that explication, it is not within this Court's purview to expand the exception here. Thus, the performance of post-conviction counsel as it relates to claims of ineffective appellate counsel do not fall within the *Martinez* exception.

(ECF No. 67, at p. 10) (footnote omitted).

### **B. Analysis on Reconsideration**

In the motion for reconsideration, petitioner argues that the Ninth Circuit's recent opinion of *Nguyen v. Curry*, 736 F.3d 1287 (9<sup>th</sup> Cir. 2013) constitutes an intervening change in the law and justifies reconsideration of this Court's decision that Ground Six of the petition is procedurally barred. In *Nguyen v. Curry*, 736 F.3d 1287 (9<sup>th</sup> Cir. 2013), the Ninth Circuit expanded the holding of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), to include claims of ineffective assistance of appellate counsel. "We therefore conclude that the *Martinez* standard for 'cause' applies to all Sixth Amendment ineffective-assistance claims, *both trial and appellate*, that have been procedurally defaulted by ineffective counsel in the initial-review state-court collateral proceeding." *Nguyen*, 736 F.3d at 1295 (emphasis added).

Respondents argue that the *Nguyen* case is not yet final because a petition for rehearing has been filed and the Ninth Circuit Court of Appeals has not yet issued mandate in the case.<sup>2</sup> However, this Court rejects respondents' argument that the *Nguyen* decision is not final. This Court construes the Ninth Circuit's published opinion in *Nguyen v. Curry*, 736 F.3d 1287 (9<sup>th</sup> Cir. 2013) as authority that shall be relied upon until, and unless, the Ninth Circuit modifies or vacates that opinion.

Respondents also argue that the *Nguyen* court's application of *Martinez* to claims of ineffective assistance of appellate counsel conflicts with the case law of other United States Circuit Courts. *See, e.g., Ibarra v. Thaler*, 687 F.3d 222, 224 (5<sup>th</sup> Cir. 2012); *Dansby v. Hobbs*, 691 F.3d

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<sup>2</sup> A review of the Ninth Circuit's docket in *Nguyen v. Curry*, Case No. 11-56792, indicates that, with the Ninth Circuit Court's permission, a petition for rehearing en banc was filed on January 16, 2014, by appellee Curry. (Appellate Docket #40). On March 13, 2014, appellant Nguyen filed a response to the petition for rehearing en banc. (Appellate Docket # 44). Additionally, amicus curiae briefs have been filed. (Appellate Docket #45, 48, 50). To date, the Ninth Circuit Court of Appeals has not issued mandate in the appeal, nor has it issued a ruling on the petition for rehearing en banc.

934, 937 (8<sup>th</sup> Cir. 2012); *Banks v. Workman*, 692 F.3d 1133, 1148 (10<sup>th</sup> Cir. 2012). Respondents further contend that the *Nguyen* decision creates an intra-circuit split of authority, because other Ninth Circuit published opinions have rejected expanding the holding of *Martinez* to claims of ineffective assistance of appellate counsel. See *Hunton v. Sinclair*, 732 F.3d 1124 (9<sup>th</sup> Cir. 2013); see also *McKinney v. Ryan*, 730 F.3d 903, 913 (9<sup>th</sup> Cir. 2013). The fact that the *Nguyen* decision may create an inter-circuit split of authority, or even an intra-circuit split of authority, does not prevent this Court from applying *Nguyen* to the case at bar. Giving petitioner the benefit of the doubt, this Court will entertain petitioner's argument that he can establish cause and prejudice to excuse his procedural default of Ground Six, his claim of ineffective assistance of appellate counsel, under the recent holding of *Nguyen*, 736 F.3d at 1295.

### 1. Cause and Prejudice Standards after *Martinez*

Where the underlying claim is one of ineffective assistance of appellate counsel, pursuant to the holding in *Nguyen*, 736 F.3d at 1295, petitioner must still establish cause and prejudice to overcome his procedural default with respect to Ground Six under the test established in *Martinez*. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the United States Supreme Court described the *Martinez* test as consisting of four requirements or prongs:

We consequently read *Coleman* as containing an exception, allowing a federal habeas court to find “cause,” thereby excusing a defendant’s procedural default, where (1) the claim of “ineffective assistance of trial counsel was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim;” and (4) state law requires that an “ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.”

*Trevino v. Thaler*, 133 S.Ct. 1918 (citing and quoting *Martinez*, 132 S.Ct. at 1318-19, 1320-21). The United States Supreme Court has defined “substantial” as a claim that “has some merit.” *Martinez*, 132 S.Ct. at 1318 (comparing the standard for certificates of appealability from *Miller-El v. Cockrell*,



1 537 U.S. 322 (2003)). Stated inversely, a claim is “insubstantial” if “it does not have any merit or ...  
2 is wholly without factual support.” *Martinez*, 132 S.Ct. at 1319.

3 Determining whether a claim is “substantial” under the first prong of the *Martinez* test  
4 requires a federal district court to examine both the deficient performance and prejudice prongs of an  
5 ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). As to  
6 deficient performance, *Strickland* emphasizes that there is a strong presumption that a trial attorney  
7 performed within the wide range of professional competence; the attorney’s performance will be  
8 deemed deficient only if it fell below an objective standard of reasonableness measured under  
9 prevailing professional norms. *Strickland*, 466 U.S. at 689-90. The *Strickland* Court outlined how  
10 to assess deficient performance in a failure to investigate claim, as follows:

11 [S]trategic choices made after thorough investigation of law and facts  
12 relevant to plausible options are virtually unchallengeable; and  
13 strategic choices made after less than complete investigation are  
14 reasonable precisely to the extent that reasonable professional  
15 judgments support the limitations on investigation. In other words,  
16 counsel has a duty to make reasonable investigations or to make a  
reasonable decision that makes particular investigations unnecessary.  
In any ineffectiveness case, a particular decision not to investigate  
must be directly assessed for reasonableness in all circumstances,  
applying a heavy measure of deference to counsel’s judgments.

17 *Strickland*, 466 U.S. at 690-91. *Strickland* cautions courts to remember that “[t]here are countless  
18 ways to provide effective assistance in any given case.” *Id.* at 689. Prejudice under *Strickland*  
19 means that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result  
20 of the proceeding would have been different.” *Id.* at 694. A reasonable probability is one “sufficient  
21 to undermine confidence in the outcome.” *Id.*

22 These standards from *Strickland* for determining deficient performance and prejudice are also  
23 the standards for an eventual review of the merits of the ineffective assistance of counsel claim.  
24 However, the first *Martinez* prong is not the same as a full merits review, but, as the *Martinez* Court  
25 explained, it is more akin to a preliminary review of a *Strickland* claim for purposes of determining  
26 whether a certificate of appealability should issue. *See Martinez*, 132 S.Ct. at 1318-19 (citing *Miller-*

1 *El v. Cockrell*, 537 U.S. 322 (2003)). Thus, the first prong of *Martinez* requires the district court to  
2 *review* but not *determine* whether trial counsel's acts or omissions resulted in deficient performance  
3 and in a reasonable probability of prejudice, and to determine only whether resolution of the merits  
4 of the claim would be debatable among jurists of reason and whether the issues are deserving enough  
5 to encourage further pursuit of them.

6 The second necessary prong of *Martinez* requires a showing that petitioner had no counsel on  
7 initial post conviction review (PCR), or that PCR counsel was "ineffective under the standards of  
8 *Strickland*." *Martinez*, 132 S.Ct. at 1318; *see also Trevino*, 133 S.Ct. at 1918. "Ineffectiveness" is a  
9 term defined by *Strickland* as deficient performance and a reasonable probability of prejudice caused  
10 by the deficient performance. 466 U.S. at 694, 700. Not just any error or omission of counsel will  
11 be deemed "deficient performance" that will satisfy *Martinez*; if the PCR "attorney in the initial-  
12 review collateral proceeding did not perform below constitutional standards," the PCR attorney's  
13 performance does not constitute "cause." *Martinez*, 132 S.Ct. at 1319. The *Strickland* standards for  
14 analyzing deficient performance apply with equal force to PCR counsel. When determining PCR  
15 counsel's performance, this Court looks to analogous law applying *Strickland* to direct appeal  
16 counsel, because like direct appeal counsel, PCR counsel is charged with raising and pursuing claims  
17 arising from a criminal trial. These standards include the rule that "effective legal assistance" does  
18 not mean that appellate counsel must appeal every question of law or every nonfrivolous issue  
19 requested by a criminal defendant. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). Instead,  
20 "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing  
21 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few  
22 key issues." *Id.* at 751-52. And given appellate counsel's wide discretion in exercising professional  
23 judgment, the presumption of effective assistance of counsel can ordinarily be overcome "only when  
24 ignored issues are *clearly stronger* than those presented . . . ." *Smith v. Robbins*, 528 U.S. 259, 288  
25 (2000) (quoting *Gray v. Greer*, F.2d 644, 646 (9<sup>th</sup> Cir. 1985) (emphasis added)).

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**2. Petitioner's Underlying Claim of Ineffective Assistance of Appellate Counsel is Not "Substantial"**

In Ground Six of the amended federal petition, petitioner asserts that his counsel on direct appeal was constitutionally ineffective. (ECF No. 44, at pp. 44-52). Petitioner asserts that this claim is "substantial" based on the following:

Sampson alleged in Ground Six, in part, that appellate counsel was ineffective for failing to submit any affidavits in support of the motion to withdraw the guilty plea. (CR 14). As outlined in detail in the amended petition, Sampson demonstrated a substantial showing of the denial of a constitutional right on each of the grounds discussed herein. His appellate attorney's conduct on appeal was outlandish as he flagrantly missed deadlines and essentially abandoned Sampson as a client. These actions deprived Sampson of his right to a timely appeal and prevented Sampson from having his appellate counsel address the trial transcript inaccuracies. Under Martinez, he has demonstrated good cause to overcome any procedural default as to these grounds in the amended petition.

(ECF No. 64, at p. 9, Petitioner's Opposition to Motion to Dismiss). While petitioner asserts that appellate counsel missed multiple briefing deadlines and failed to regularly communicate with him due to then-overwhelming workloads within the Public Defender's Appeal Unit (see ECF No. 44, at pp. 44-48), petitioner also acknowledges that counsel eventually filed an opening brief on October 14, 2004 (*Id.*, at p. 47; Exhibit 95). The opening brief filed by appellate counsel is 43 pages in length and raises three claims, all of which petitioner has continued to pursue in this federal habeas proceeding. (Exhibit 95; ECF No. 44). While appellate counsel's delays in filing the appellate brief were unfortunate, petitioner has not asserted facts to show that, given counsel's overwhelming workload, the brief could have been filed any sooner. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). When a petitioner's attorney misses a filing deadline, the petitioner cannot rely on that to establish cause. *See Coleman*, 501 U.S. at 753-54. Given appellate counsel's eventual fulfillment of his basic duty – to file an opening brief on

petitioner's behalf, and petitioner's apparent satisfaction with the quality of the opening brief, Ground Six is not a "substantial" claim of ineffective assistance of counsel that "deserve[s] encouragement to proceed further" on the issue of deficient performance. *See Miller-El*, 537 U.S. at 336.

Petitioner's ineffective assistance of appellate counsel claim is also undeserving of further encouragement on the issue of prejudice. Petitioner acknowledges that a notice of appeal was timely filed in his case. (ECF No. 44, at p. 44). Petitioner provides no argument or facts to show how the outcome of the appeal may have been different had appellate counsel filed the opening brief sooner. Petitioner does not identify what inaccuracies, if any, he found in the trial transcripts, or show that such inaccuracies might have altered the outcome of his direct appeal. Petitioner's prejudice arguments lack merit and are insufficient to show that his ineffective assistance of appellate counsel claim is "substantial," in order to meet the first prong of the *Martinez* cause and prejudice standard.

### **3. Petitioner Has Not Shown that PCR Counsel's Performance Was Deficient Under *Strickland***

Pursuant to the second prong of the *Martinez* cause and prejudice test, petitioner must demonstrate "cause" for his procedural default by showing either that he had no PCR counsel, or that PCR counsel was ineffective under *Strickland*. *See Martinez*, 132 S.Ct. at 1312. Petitioner argues that he was not provided with counsel prior to the denial of his first state post-conviction habeas proceeding, and that constitutes "*per se* cause" to excuse his procedural default. (ECF No. 64, at p. 8). However, petitioner also acknowledges that attorney Christopher Oram was appointed to represent him in his post-conviction proceedings after the Nevada Supreme Court remanded his state post-conviction petition to the state district court for an evidentiary hearing. (ECF No. 64, at p. 8; ECF No. 44, at p. 15; Exhibit 139). Attorney Oram was therefore petitioner's PCR counsel.

The record shows that after being appointed to represent petitioner on February 6, 2008, attorney Oram represented petitioner at the evidentiary hearing concerning his post-conviction state habeas claim that trial counsel was ineffective for failing to present Dr. Racoma's expert testimony

1 regarding the victim having oppositional defiant disorder. (Exhibit 144). After the conclusion of the  
2 evidentiary hearing, attorney Oram filed a supplemental brief raising the ineffective assistance of  
3 trial counsel claim explored at the evidentiary hearing. (Exhibit 148). Attorney Oram's brief did not  
4 raise petitioner's defaulted ineffective assistance of appellate counsel claim. (*Id.*).

5       The cause analysis must focus on the *Strickland* standard regarding the facts and  
6 circumstances of PCR counsel's (Oram's) representation. Petitioner must overcome the "strong  
7 presumption" that PCR counsel's decision to raise the ineffective assistance of trial counsel claim  
8 and not raise the defaulted claim of ineffective assistance of appellate counsel was within the "wide  
9 range of professional competence" as described in *Strickland*. As discussed earlier, appellate and  
10 post-conviction counsel do not have a constitutional duty to raise every nonfrivolous issue requested  
11 by a defendant, "but rather may select from among them in order to maximize the likelihood of  
12 success on appeal." *Robbins*, 528 U.S. at 288. Petitioner does not assert that he discussed Ground  
13 Six with PCR counsel Oram at any time, and petitioner has not shown that Ground Six was "clearly  
14 stronger" than the ineffective assistance of trial counsel claim raised by PCR counsel Oram. *See*  
15 *Robbins*, 528 U.S. at 288. The mere fact that PCR counsel Oram did not also raise an ineffective  
16 assistance of appellate counsel claim, as is presented in Ground Six of the amended federal petition,  
17 does not, without more, establish that his performance was deficient. *See Robbins*, 528 U.S. at 288  
18 (direct appeal counsel does not have a constitutional duty to raise every nonfrivolous issue, even if  
19 requested by defendant); *see also Murray v. Carrier*, 477 U.S. at 486-87 ("[T]he mere fact that  
20 counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite  
21 recognizing it, does not constitute cause for procedural default."). Rather, *Strickland* requires that  
22 Oram's representation be analyzed with a "strong presumption" that it satisfied constitutional norms.  
23 *See Strickland*, 466 U.S. at 689. Petitioner has not alleged facts which, if true, would establish that  
24 PCR counsel Oram's actions fell below an objective standard of reasonableness measured under  
25 prevailing professional norms.

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1        Additionally, petitioner has not shown that he was prejudiced by PCR counsel Oram's  
 2 representation. Prejudice under *Strickland* means that "there is a reasonable probability that, but for  
 3 counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.  
 4 A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.* In this  
 5 case, petitioner has not shown a reasonable probability of prevailing on his defaulted ineffective  
 6 assistance of appellate counsel claim. As such, petitioner has failed to show that he was prejudiced  
 7 by PCR counsel's failure to raise the ineffective assistance of appeal counsel claim in his state post-  
 8 conviction habeas proceedings.

9                    **C. Petitioner Fails to Show Cause and Prejudice to Excuse the Procedural Default of**  
 10                    **Ground Six**

11        This Court has considered petitioner's argument that he can establish cause and prejudice  
 12 under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) to excuse his procedural default of Ground Six, his  
 13 claim of ineffective assistance of counsel, as allowed under the recent case of *Nguyen v. Curry*, 736  
 14 F.3d 1287 (9<sup>th</sup> Cir. 2013). In summary, petitioner has failed to show that his ineffective assistance of  
 15 appellate counsel claim in Ground Six of the amended petition is "substantial," in order to meet the  
 16 first prong of the *Martinez* cause and prejudice standard. Petitioner also has not met the second  
 17 prong of the *Martinez* cause and prejudice standard, because he failed to show that PCR counsel's  
 18 performance was deficient and resulted in prejudice under *Strickland*. Petitioner has failed to assert  
 19 facts that, if true, would establish cause and prejudice to excuse his procedural default of Ground  
 20 Six. *See Trevino v. Thaler*, 133 S.Ct. 1911, 1918 (2013); *Martinez*, 132 S.Ct. at 1318-21; *Nguyen*,  
 21 726 F.3d at 1293. Accordingly, the Court denies petitioner's motion for reconsideration of this  
 22 Court's prior ruling that Ground Six of the amended petition is procedurally barred. Ground Six of  
 23 the amended petition remains dismissed with prejudice as procedurally barred.

24                    **III. Federal Habeas Corpus Standards**

25        The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d),  
 26 provides the legal standard for the Court's consideration of this habeas petition:

1 An application for a writ of habeas corpus on behalf of a person in  
 2 custody pursuant to the judgment of a State court shall not be granted  
 with respect to any claim that was adjudicated on the merits in State  
 court proceedings unless the adjudication of the claim –

3 (1) resulted in a decision that was contrary to, or involved an  
 4 unreasonable application of, clearly established Federal law, as  
 determined by the Supreme Court of the United States; or

5 (2) resulted in a decision that was based on an unreasonable  
 6 determination of the facts in light of the evidence presented in the State  
 court proceeding.  
 7

8 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications  
 9 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect  
 10 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court  
 11 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.  
 12 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme  
 13 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from  
 14 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme  
 15 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529  
 16 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). The formidable  
 17 standard set forth in section 2254(d) reflects the view that habeas corpus is “‘a guard against extreme  
 18 malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction  
 19 through appeal.” *Harrington v. Richter*, 562 U.S. \_\_\_, \_\_\_, 131 S.Ct. 770, 786 (2011) (quoting  
 20 *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

21 A state court decision is an unreasonable application of clearly established Supreme Court  
 22 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct  
 23 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that  
 24 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,  
 25 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more  
 26 than merely incorrect or erroneous; the state court’s application of clearly established federal law



1 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). In determining whether a  
 2 state court decision is contrary to, or an unreasonable application of federal law, this Court looks to  
 3 the state courts' last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991);  
 4 *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9<sup>th</sup> Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

5 In a federal habeas proceeding, "a determination of a factual issue made by a State court shall  
 6 be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of  
 7 correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). If a claim has been  
 8 adjudicated on the merits by a state court, a federal habeas petitioner must overcome the burden set  
 9 in § 2254(d) and (e) on the record that was before the state court. *Cullen v. Pinholster*, 131 S.Ct.  
 10 1388, 1400 (2011).

#### 11 **IV. Discussion of Remaining Grounds of Amended Petition**

##### 12 **A. Ground One**

13 Petitioner asserts that his constitutional rights were violated when the trial court precluded  
 14 the defense from introducing evidence that the victim suffered from Oppositional Defiant Disorder  
 15 (ODD), including expert testimony from Dr. Racoma. (ECF No. 44, at pp. 20-28). The Nevada  
 16 Supreme Court denied this claim on direct appeal, as follows:

17 Sampson argues that the district court erred by refusing to allow him to  
 18 call Dr. Racoma to testify regarding the fact that the victim was  
 19 diagnosed with ODD. The district court has discretion to determine  
 the admissibility of expert testimony, and we review this decision for a  
 clear abuse of discretion.

20 Under NRS 174.234(1)(a), both defense counsel and the prosecution  
 21 must submit to each other, at least five days prior to trial, written  
 22 notice of all witnesses they intend to call. Further, under NRS  
 174.234(2), written notice of expert witnesses must be filed and served  
 23 upon the opposition at least twenty-one days before trial. Pursuant to  
 NRS 174.295(2), the remedy for a violation of the discovery  
 24 provisions of NRS 174.234 is that the district court "may order the  
 25 party to permit the discovery or inspection of materials not previously  
 26 disclosed, grant a continuance, or prohibit the party from introducing  
 in evidence the material not disclosed, or it may enter such other order  
 as it deems just under the circumstances."



1 When addressing discovery violations, the district court must be  
2 cognizant that defendants have the constitutional right to discredit their  
3 accuser, and this right “can be but limitedly circumscribed.”  
4 Therefore, to protect this constitutional right, there is a strong  
5 presumption to allow the testimony of even a late-disclosed witness,  
6 and evidence should be admitted when it goes to the heart of the case.  
7 However, the district court must also balance this right against “not  
8 only the waste of judicial time factor . . . but must take particular care  
9 not to permit annoying, harassing, humiliating and purely prejudicial  
10 attacks unrelated to credibility.”

11 We agree with Sampson that the testimony he sought to admit would  
12 have been helpful to his defense. However, the district court did not  
13 abuse its discretion when it denied Sampson the right to call Dr.  
14 Racoma. Sampson had access to the victim’s school records prior to  
15 trial, but Sampson’s counsel states that because the writing in the  
16 school records was unclear, he believed that the doctor’s name was  
17 “Dr. Raconia” instead of “Dr. Racoma.” Thus, he argues that there  
18 was no delay in disclosing Dr. Racoma as an expert witness because he  
19 did not find out that the report was actually referring to Dr. Racoma  
20 until the eighth day of trial.

21 We find this assertion unpersuasive. Although Dr. Racoma’s name  
22 was spelled incorrectly, it nonetheless would not have been difficult  
23 for Sampson’s counsel to locate Dr. Racoma based on these records.  
24 Also, even if Sampson’s counsel could not locate Dr. Racoma, he  
25 could have brought in evidence of the victim’s diagnosis of ODD in  
26 other ways. Most clearly, Sampson’s counsel could have used the  
school records to question the victim’s mother regarding the ODD  
diagnosis.

Further, if the State did not anticipate this witness and had Dr.  
Racoma’s testimony been allowed, it would have resulted in an unfair  
surprise to the State. Fairness during trial is not one-sided and applies  
to both the defendant and the State. The fault herein lies not with the  
district court, but instead with Sampson’s attorney, who inexplicably  
failed to present the evidence contained in the school records or timely  
pursue the testimony of Dr. Racoma. Thus, the district court did not  
abuse its discretion by denying Sampson’s request for introduce Dr.  
Racoma.

(Exhibit 100, at pp. 8-10) (footnotes omitted)).

“[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a  
complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *see also Moses v. Payne*, 555 F.3d  
742, 757 (9<sup>th</sup> Cir. 2009). “The Supreme Court has indicated that a defendant’s right to present a  
defense stems from the right to due process provided by the Fourteenth Amendment . . . and from the

1 right to have compulsory process for obtaining witnesses in his favor provided by the Sixth  
 2 Amendment.” *Moses*, 555 F.3d at 757 (internal quotation and citation omitted). Nevertheless, “[a]  
 3 defendant’s right to present relevant evidence is not unlimited, but rather is subject to reasonable  
 4 restrictions,’ such as evidentiary and procedural rules.” *Moses*, 555 F.3d at 757 (quoting *United*  
 5 *States v. Scheffer*, 523 U.S. 303, 308 (1998)). When evidence is excluded on the basis of a valid  
 6 application of a state evidentiary rule, such exclusion may violate due process if the evidence is  
 7 sufficiently reliable and crucial to the defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).  
 8 In general, however, there must be “unusually compelling circumstances . . . to outweigh the strong  
 9 state interest in administration of its trials.” *Perry v. Rushen*, 713 F.2d 1447, 1452 (9<sup>th</sup> Cir. 1983).

10 In determining whether the exclusion of evidence pursuant to state evidentiary law violates  
 11 federal due process and the right to present a defense, the Ninth Circuit has, in the past, applied a  
 12 balancing test, considering these factors: (1) the probative value of the excluded evidence on the  
 13 central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether  
 14 it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part  
 15 of the attempted defense. See *Miller v. Stagner*, 757 F.2d 988, 994 (9<sup>th</sup> Cir. 1985), *amended on other*  
 16 *grounds by* 768 F.2d 1090 (9<sup>th</sup> Cir. 1985); *Chia v. Cambra*, 360 F.3d 997, 1004 (9<sup>th</sup> Cir. 2004).

17 More recently, however, in *Moses v. Payne*, the Ninth Circuit questioned the current  
 18 applicability of the *Miller* balancing test under the AEDPA. *Moses*, 555 F.3d at 758. In *Moses*, the  
 19 Ninth Circuit noted that the question before it was not an issue of whether a state evidentiary rule, by  
 20 its own terms, impinged upon a defendant’s constitutional rights; rather, the issue was whether a trial  
 21 court’s discretionary determination to exclude evidence violated a defendant’s constitutional rights.  
 22 *Moses*, 55 F.3d at 758-60. The *Moses* court concluded that “because the *Miller* balancing test is a  
 23 creation of circuit law, rather than a [United States] Supreme Court holding,” a state court’s failure  
 24 to employ *Miller* did not necessarily warrant habeas relief. *Moses*, 555 F.3d at 759-60. Rather,  
 25 under the AEDPA, the question was whether the state court’s decision was “contrary to or an  
 26 unreasonable application of the Supreme Court precedent that *Miller* interpreted.” *Id.* (citing 28

1 U.S.C. § 2254(d) and *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006)). The Ninth Circuit went on to  
2 find that “[b]ecause the Supreme Court’s precedents do not establish a principle for evaluating  
3 discretionary decisions to exclude the kind of evidence at issue here, AEDPA does not permit us to  
4 rely on our [*Miller*] balancing test to conclude that a state trial court’s exclusion of evidence [under a  
5 state evidentiary rule] violated clearly established Supreme Court precedent.” *Moses*, 555 F.3d at  
6 760. Finally, where a state court erred under federal law in excluding evidence, a petitioner must  
7 still show that such error was prejudicial under the federal harmless error standard by demonstrating  
8 that the error “had a substantial and injurious effect or influence in determining the jury’s verdict.”  
9 *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

10 To the extent that petitioner asserts that his right to “confront the witnesses against him” was  
11 violated when the trial court excluded evidence concerning the victim’s mental health (ECF No. 44,  
12 at p. 20), he fails to state a claim upon which relief can be granted. Under the Sixth Amendment’s  
13 Confrontation Clause, “[i]n all criminal proceedings, the accused shall enjoy the right . . . to be  
14 confronted with the witnesses against him . . . .” U.S. Const. Amend. VI. A Confrontation Clause  
15 issue is typically presented when evidence is admitted at trial against a defendant. *See, e.g.*,  
16 *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that Confrontation Clause bars  
17 introduction of “testimonial” statements by a witness that implicates defendant unless the witness  
18 testifies at trial and is subject to cross examination or the witness is unavailable and defendant had a  
19 prior opportunity to cross examine the witness). Where testimony from a defendant’s expert witness  
20 is excluded at trial, the issue is properly analyzed in light of a defendant’s constitutional right to  
21 present relevant evidence in his own defense. *See Moses v. Payne*, 555 F.3d at 754-60  
22 (distinguishing between analysis of admission of evidence in violation of Confrontation Clause and  
23 analysis of exclusion of evidence in violation of right to present a defense). In the instant case, the  
24 defense sought to introduce evidence of the victim’s mental health problems through the testimony  
25 of Dr. Racoma, but the trial court denied this request because the defense had failed to disclose that  
26 Dr. Racoma would be called as an expert witness until the eighth day of trial. (*See Exhibit 100*, at

1 pp. 9-10). Consequently, no “testimonial” statement from Dr. Racoma or any other witness, is at  
2 issue here and petitioner has failed to state a claim that his Confrontation Clause rights have been  
3 violated. *Cf. Crawford*, 541 U.S. at 68; *Moses*, 555 F.3d at 754-60.

4 The Nevada Supreme Court upheld the trial court’s decision to exclude Dr. Racoma’s  
5 testimony because petitioner failed to disclose Dr. Racoma as an expert witness as required by  
6 Nevada’s evidentiary rules. (Exhibit 100, at p. 8) (citing NRS 174.234(1)(a); NRS 174.234(2)). The  
7 trial court sustained the State’s objections to defense counsel’s questions concerning the victim’s  
8 mental health problems because the questions had been asked and answered, or had mischaracterized  
9 the evidence presented at trial. (Exhibit 49, at pp. 60-61; Exhibit 50, at pp. 151-52). Petitioner does  
10 not challenge the legality of the state evidentiary rules, but argues that the trial court erred in  
11 excluding the testimony at issue. (ECF No. 44, at pp. 21-24). Thus, petitioner’s argument is best  
12 interpreted as a challenge to the trial court’s exercise of discretion in this case to exclude the  
13 testimony. As such, petitioner’s claim fails under *Moses*, because “the Supreme Court’s cases have  
14 focused only on whether an evidentiary rule, by its own terms, violated a defendant’s constitutional  
15 right to present evidence. These cases do not squarely address whether a court’s exercise of  
16 discretion to exclude expert testimony violates a criminal defendant’s constitutional right to present  
17 relevant evidence.” *Moses*, 555 F.3d at 759 (citing *Wright v. Van Patten*, 128 S.Ct. 743, 746  
18 (2008)). The Nevada Supreme Court’s determination that the trial court did not violate petitioner’s  
19 constitutional rights is not contrary to or an unreasonable application of clearly established United  
20 States Supreme Court precedent.

21 The trial court exercised its discretion and excluded Dr. Racoma’s testimony because the  
22 defense failed to disclose him as an expert witness until the eighth day of trial. Petitioner does not  
23 dispute that the defense failed to provide proper notice that Dr. Racoma would be testifying as an  
24 expert witness, nor does he challenge the legality of Nevada’s evidentiary rule that allows the trial  
25 court to preclude such testimony. (*See* ECF No. 44, at p. 24) (asserting only that “[t]here was no  
26

1 justification for its preclusion.”). Thus, the trial court’s decision to exclude Dr. Racoma’s testimony  
2 on the basis of Nevada’s evidentiary rules is unchallenged.

3 Even if the Court were to determine that the trial court’s exclusion of Dr. Racoma’s  
4 testimony was a constitutional error, relief is unwarranted unless the error “had a substantial and  
5 injurious effect or influence in determining the jury’s verdict.” *Brecht*, 507 U.S. at 637. The burden  
6 of demonstrating that error resulted in actual prejudice lies with the habeas petitioner. *Id.* As the  
7 Nevada Supreme Court observed in its affirmance on direct appeal, petitioner could have located Dr.  
8 Racoma with reasonable efforts or introduced evidence of the victim’s mental health problems by  
9 confronting the victim’s mother with school records of the victim’s diagnosis. (Exhibit 100, at p.  
10 10). Additionally, Dr. Racoma testified during the subsequent post-conviction evidentiary hearing  
11 that he never observed the victim to be untruthful (Exhibit 144, at p. 24), that the purpose of his  
12 visits with the victim had nothing to do with whether the victim was truthful (*id.*), that he would not  
13 opine whether the victim had lied in this case (*id.* at p. 50), and that he had never encountered a  
14 person with ODD to have fabricated an instance of sexual assault (*id.* at p. 51).

15 The Nevada Supreme Court correctly determined that while the victim’s testimony was not  
16 without inconsistencies, much of the testimony was corroborated by evidence found in petitioner’s  
17 home. (Exhibit 171, at p. 2; Exhibit 52, at p. 92 (listing physical evidence corroborating the victim’s  
18 testimony)). Further, the jury was informed that the victim was on medication for behavioral issues,  
19 and defense counsel was permitted to ask a doctor whether ODD could have affected the victim’s  
20 truthfulness. (Exhibit 49, at pp. 60-61) (victim’s mother testifying as to victim’s behavior issues and  
21 medication); Exhibit 50, at p. 151 (Dr. Vergara responding to questions posed by the defense). For  
22 all of these reasons, any alleged error in excluding the testimony of Dr. Racoma did not have a  
23 substantial and injurious effect on the jury’s verdict. Petitioner has failed to meet his burden of  
24 proving that the Nevada Supreme Court’s ruling was contrary to, or involved an unreasonable  
25 application of, clearly established federal law, as determined by the United States Supreme Court, or  
26 that the ruling was based on an unreasonable determination of the facts in light of the evidence

1 presented in the state court proceeding. This Court denies federal habeas relief on Ground One of  
2 the amended petition.

3 **B. Ground Three**

4 Petitioner asserts that his rights to due process and a fair trial were violated when police  
5 officers testified concerning his refusal to consent to a warrantless search of his home. (ECF No. 44,  
6 at pp. 33-36). The Nevada Supreme Court rejected this claim, as follows:

7 Sampson argues that the district court erred by permitting the State to  
8 present testimony that discussed Sampson's invocation of his Fourth  
9 Amendment right to refuse to consent to a search of his residence. The  
10 testimony at issue was elicited by the State from two LVMPD officers  
11 who testified that they asked Sampson if they could enter his residence  
12 to retrieve the victim's clothing, and Sampson replied that he did not  
13 want them to enter his home. Sampson did not object to this testimony  
14 and therefore has the burden of establishing that plain error affecting  
15 his substantial rights occurred. We conclude that he fails to do so.

12 Whether it is constitutional error for a prosecutor to elicit testimony or  
13 comment on a defendant's refusal to consent to a warrantless search to  
14 support an inference of guilt is an issue of first impression in Nevada.  
15 This proposition has been assumed by many courts, and today we  
16 adopt this rule in Nevada. As one court has stated, "[A]n individual  
17 should be able to invoke his Fourth Amendment rights without having  
18 his refusal used against him at trial."

16 Courts addressing this issue recognize that there are similarities  
17 between exercising Fourth Amendment rights and exercising other  
18 constitutional rights, and they determine that it is improper for the  
19 State to effectively punish a defendant for asserting her constitutional  
20 rights. One court has stated, "[j]ust as a criminal suspect may validly  
21 invoke his Fifth Amendment privilege in an effort to shield himself  
22 from criminal liability, so one may withhold consent to a warrantless  
23 search, even though one's purpose be to conceal evidence of  
24 wrongdoing."

21 This court has previously addressed references made during trial to a  
22 defendant's exercise of her Fifth Amendment rights, and in Morris v.  
23 State, we set forth the test to determine whether such a comment  
24 results in reversible error. In Morris, we held that references to a  
25 defendant's exercise of her Fifth Amendment rights are harmless  
26 beyond a reasonable doubt and do not require reversal of a conviction  
if, "(1) at trial there was only a mere passing reference, without more,  
to an accused's post-arrest silence, or (2) there is overwhelming  
evidence of guilt." Today we adopt this test for comments on  
defendant's exercise of Fourth Amendment rights. Thus, where there

1 is only a mere passing reference, without more, to an accused's  
2 invocation of Fourth Amendment rights, there is harmless error.

3 Based on the test set forth in Morris, we conclude that in the instant  
4 case the district court erred in allowing this testimony. But even  
5 assuming that the error was plain, it did not prejudice Sampson's  
6 substantial rights. The testimony of the police officers regarding  
7 Sampson's refusal to consent to a warrantless search of his residence  
8 was no more than a mere passing reference. The officers were asked if  
9 they spoke with the defendant, and if so, what the defendant said to  
10 them. This was not questioning that was aimed at discussing  
11 Sampson's refusal to consent to the warrantless search of his  
12 residence. Thus, although the district court erred by allowing this  
13 testimony, the error was not prejudicial and does not require reversal  
14 of Sampson's conviction.

15 (Exhibit 100, at pp. 10-14 (footnotes omitted)).

16 First, this Court notes that the United States Supreme Court has not addressed whether the  
17 Constitution prohibits a prosecutor from eliciting testimony concerning a defendant's refusal to  
18 consent to a search. Absent such guidance, the Nevada Supreme Court was free to adopt a rule of its  
19 choosing. Because there is no United States Supreme Court authority that squarely addresses the  
20 issue or gives a clear answer to the question presented, the Nevada Supreme Court's decision,  
21 including its harmless error analysis, cannot be contrary to, or involve an unreasonable application of  
22 United States Supreme Court precedent. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) (denying  
23 habeas relief where "[n]o holding of this Court" addressed the issue presented).

24 Even if the trial court committed an error of constitutional magnitude, such error is subject to  
25 this Court's application of the *Brecht* harmless error rule, without regard for the state court's  
26 harmless error determination. *Merillo v. Yates*, 663 F.3d 444, 455 (9<sup>th</sup> Cir. 2011). Petitioner is not  
entitled to federal habeas relief unless he demonstrates that the error "had a substantial and injurious  
effect or influence in determining the jury's verdict" under the independent harmless error standard  
of *Brecht v. Abramson*, 507 U.S. 619, 623 (1993).

27 Petitioner argues that he was prejudiced because, after the State's reference to his invocation  
28 of his Fourth Amendment rights, "he was then compelled to explain to the jury why he refused to  
29 consent to the search, namely that he had marijuana in his apartment. (ECF No. 44, at p. 35 (citing



1 Exhibit 51, at p. 62)). While petitioner may have been reluctant to ignore the officer's testimony  
2 about his statement refusing consent to search his residence, he was not "compelled" to admit to  
3 possessing an illegal drug on direct examination, anymore so than he was compelled to take the stand  
4 at all. *See Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to  
5 testify in his own defense, or to refuse to do so."). The jury was instructed that "[e]ach charge and  
6 the evidence pertaining to it should be considered separately" and that "[t]he fact that you may find a  
7 defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to  
8 any other offense charged." (Exhibit 54, Instruction No. 5). Reviewing courts must presume that a  
9 jury followed the instructions it was given. *Drayden v. White*, 232 F.3d 704, 713 (9<sup>th</sup> Cir. 2000).

10 Even assuming that the trial court erred in allowing testimony concerning petitioner's  
11 refusal to consent to a search of his residence, petitioner is not entitled to federal habeas relief  
12 because he has failed to demonstrate that the error "had a substantial and injurious effect or influence  
13 in determining the jury's verdict." *Brecht*, 507 U.S. at 623. As such, the error was harmless. *Id.*  
14 Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was  
15 contrary to, or involved an unreasonable application of, clearly established federal law, as  
16 determined by the United States Supreme Court, or that the ruling was based on an unreasonable  
17 determination of the facts in light of the evidence presented in the state court proceeding. This Court  
18 denies federal habeas relief on Ground Three of the amended petition.

#### 19 **C. Ground Four**

20 Petitioner asserts that his constitutional rights were violated when a police officer testified  
21 that he had invoked his rights to remain silent and to an attorney. (ECF No. 44, at pp. 36-39). On  
22 direct appeal, the Nevada Supreme Court determined that the testimony was erroneously admitted,  
23 but that the error was harmless:

24 During trial, Sampson brought a motion for a mistrial based upon the  
25 testimony of Detective Castaneda discussing Sampson's invocation of  
26 the right to remain silent and to have an attorney. Detective Castaneda  
testified that when he arrived at the scene of the crime, he was  
informed that Sampson had already been detained in a patrol car and



1 that officers and detectives were not speaking with Sampson because  
 2 he had requested an attorney. The State apologized for the testimony,  
 3 argued that it had not elicited the testimony, and offered a curative  
 4 instruction. Sampson refused the instruction. The district court  
 5 admitted that the comments were error but determined the error to be  
 6 harmless and denied Sampson's motion for a mistrial. We agree with  
 7 the district court that this testimony was error and that such error is  
 8 harmless.

9 Whether a prosecutor's comment on a defendant's invocation of his  
 10 Fifth Amendment rights is reversible error depends on whether "the  
 11 language used was manifestly intended to be or was of such a character  
 12 that the jury would naturally and necessarily take it to be comment on  
 13 the defendant's [assertion of her Fifth Amendment rights]." Also,  
 14 comments concerning the invocation of a defendant's Fifth  
 15 Amendment rights are only unconstitutional when they are designed to  
 16 draw a meaning from the silence. When determining the intended  
 17 meaning, we view these improper prosecutorial comments in context,  
 18 and a criminal conviction should not be lightly overturned on the basis  
 19 of the comments alone. The same is true for brief testimonial  
 20 comments. As discussed, the test for whether a conviction must be  
 21 overturned is whether there was more than a mere passing reference to  
 22 the invocation of Fifth Amendment rights.

23 We conclude that Detective Castaneda's statement was merely a  
 24 passing reference. Detective Castaneda's statement was unsolicited by  
 25 the State, and he testified to the above in response to questions about  
 26 what he found when he arrived at the scene of the crime and whether  
 he made any contact with the suspect at the time. Thus, the context of  
 his statement was not designed to draw a meaning from silence and  
 amounted to harmless error.

(Exhibit 100, at pp. 14-15) (footnotes omitted)).

27 The State's use of a defendant's silence at the time of arrest and after receiving *Miranda*  
 28 warnings for impeachment purposes can violate due process. *See Doyle v. Ohio*, 426 U.S. 610, 617-  
 29 18 (1976). In the instant case, it is undisputed that Detective Castaneda testified that petitioner  
 30 invoked his right to remain silent and to have an attorney. (Exhibit 50, at pp. 94-95). Petitioner  
 31 argues that the testimony was prejudicial: "Since this post-arrest assertion of his constitutional  
 32 privileges followed on the heels of prior voluntary statements, the timing allowed the jury to infer  
 33 that his post-arrest silence meant that he was guilty of the crimes for which he was arrested." (ECF  
 34 No. 44, at p. 38). Petitioner is not entitled to federal habeas relief unless he demonstrates that the

1 error “had a substantial and injurious effect or influence in determining the jury’s verdict” under the  
2 independent harmless error review standard of *Brecht v. Abramson*, 507 U.S. 619, 623 (1993).

3 During the prosecution’s direct examination of Detective Casteneda, the following exchange  
4 occurred:

5 Q: What did you find upon your arrival to the scene?

6 A: By that time arrival, general assignment detectives were already there with parole –  
7 and – uh – the victim Prince was in the back of a patrol car. And if I remember right,  
his mother was also in that patrol car with him.

8 Q: Did you make any contact with the defendant or the suspect at that time?

9 A: If I remember correctly he was in another patrol car, and I had been advised by the  
10 general assignment detectives and officers that he had requested an attorney, so we  
weren’t talking to him.

11 (Exhibit 50, at pp. 94-95). Following that exchange, a bench conference was held and the prosecutor  
12 immediately moved on to other topics. (Exhibit 50, at p. 95). At the conclusion of Detective  
13 Casteneda’s testimony and outside the presence of the jury, defense counsel objected to the  
14 testimony and moved for mistrial. (*Id.*, at pp. 135-36). The prosecutor apologized for the statement,  
15 stated that she did not intend to elicit the comment, and suggested that a curative instruction be given  
16 to the jury. (*Id.*, at p. 136). The trial court determined that the statement constituted error, but that  
17 the error was harmless. (*Id.*, at p. 138). During a conference concerning jury instructions, defense  
18 counsel declined a curative instruction because he “didn’t want to bring it up to their [jurors]  
19 attention anymore.” (Exhibit 52, at p. 36).

20 The prosecutor did not ask the witness whether petitioner had invoked his rights to remain  
21 silent or to an attorney, nor did she dwell on or ask any follow-up questions concerning the witness’  
22 statement. (Exhibit 50, at pp. 94-95). Petitioner had the opportunity to benefit from a curative jury  
23 instruction, but declined the offer. (Exhibit 52, at p. 36). Petitioner has not demonstrated that  
24 Detective Castaneda’s testimony that petitioner invoked his right to remain silent and to have an  
25 attorney “had a substantial and injurious effect or influence in determining the jury’s verdict.”  
26 *Brecht v. Abramson*, 507 U.S. at 623. As such, the error was harmless. *Id.* Petitioner has failed to

1 meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an  
2 unreasonable application of, clearly established federal law, as determined by the United States  
3 Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of  
4 the evidence presented in the state court proceeding. This Court denies federal habeas relief on  
5 Ground Four of the amended petition.

6 **D. Ground Five**

7 Petitioner asserts that his right to the effective assistance of counsel was violated when his  
8 trial counsel failed to include Dr. Racoma as an expert witness at trial to testify about the victim's  
9 oppositional defiant disorder (ODD). (ECF No. 44, at pp. 39-44). Petitioner asserted this claim in  
10 his post-conviction state habeas petition. (Exhibit 102). Without holding an evidentiary hearing, the  
11 state district court denied the petition on January 8, 2007. (Exhibit 105). In addressing this claim on  
12 appeal from the denial of petitioner's post-conviction habeas petition, the Nevada Supreme Court  
13 remanded the case to the state district court for an evidentiary hearing to determine whether trial  
14 counsel's failure to include expert testimony on ODD from Dr. Racoma prejudiced petitioner.  
15 (Exhibit 126, at pp. 5-6). On remand and with the assistance of appointed counsel, an evidentiary  
16 hearing on the state habeas petition was conducted on June 16, 2008. (Exhibit 144). Following the  
17 evidentiary hearing, the petition was denied by the state district court. (Exhibit 161). On appeal,  
18 petitioner raised the claim that his trial counsel was ineffective for failing to present expert testimony  
19 on the victim's oppositional defiant disorder. (Exhibit 165). The Nevada Supreme Court rejected  
20 petitioner's ineffective assistance of counsel claim, finding that petitioner failed to show that he was  
21 prejudiced:

22 We conclude that substantial evidence supports the district court's  
23 finding that appellant failed to demonstrate that he was prejudiced by  
24 the failure to present Dr. Racoma's testimony at trial. At the  
25 evidentiary hearing, Dr. Racoma testified that persons with ODD act  
26 defiant and may lie more often to authority figures, such as parents and  
teachers. However, Dr. Racoma also testified that he was unaware of  
anyone with ODD fabricating a story about sexual abuse and could not  
tell if the victim was untruthful regarding his testimony in this case.  
Further, the victim's testimony at trial was corroborated by evidence

1 found in appellant's home. In addition, while ODD was not explained  
2 in detail at the trial, the jury was informed that the victim was  
3 prescribed medication for behavioral issues and a doctor who  
4 examined the victim shortly after the sexual assault was asked if  
5 ADHD and ODD could have affected the victim's ability to be  
6 truthful. Given this information, appellant fails to demonstrate a  
reasonable probability of a different outcome had counsel investigated  
and presented Dr. Racoma's testimony concerning the victim's  
treatment for ODD. Therefore, appellant fails to demonstrate that the  
district court erred in denying this claim.

7 Appellant also argues that he was prejudiced by the failure to present  
8 Dr. Racoma's testimony because Dr. Racoma could have refuted the  
9 victim's mother's statement that the victim had only been diagnosed  
10 with ADHD. The victim's mother did not discuss her son's diagnoses  
in detail and appellant fails to demonstrate a reasonable probability of  
a different outcome had counsel presented testimony to refute her brief  
discussion of the victim's issues. Therefore, appellant fails to  
demonstrate that the district court erred in denying this claim.

11 (Exhibit 171, at pp. 2-3).

12 Ineffective assistance of counsel claims are governed by the two-part test announced in  
13 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a  
14 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1)  
15 counsel's performance was unreasonably deficient, and (2) that the deficient performance prejudiced  
16 the defense. *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687).  
17 To establish ineffectiveness, the defendant must show that counsel's representation fell below an  
18 objective standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there  
19 is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding  
20 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine  
21 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be  
22 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in  
23 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's  
24 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.  
25 *Id.*

26 ///

1 Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
 2 performance of counsel resulting in prejudice, “with performance being measured against an  
 3 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*  
 4 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an  
 5 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary  
 6 to, or an unreasonable application of the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1,  
 7 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide range of  
 8 reasonable professional assistance. *Id.*

9 The United States Supreme Court has described federal review of a state supreme court’s  
 10 decision on a claim of ineffective assistance of counsel as “doubly deferential.” *Cullen v. Pinholster*,  
 11 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 112-113, 129 S.Ct.  
 12 1411, 1413 (2009)). In *Cullen v. Pinholster*, the Supreme Court emphasized that: “We take a ‘highly  
 13 deferential’ look at counsel’s performance . . . through the ‘deferential lens of § 2254(d).” *Id.* at  
 14 1403 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance of  
 15 counsel claim is limited to the record before the state court that adjudicated the claim on the merits.  
 16 *Cullen v. Pinholster*, 131 S.Ct. at 1398-1401. The United States Supreme Court has specifically  
 17 reaffirmed the extensive deference owed to a state court’s decision regarding claims of ineffective  
 18 assistance of counsel:

19 Establishing that a state court’s application of *Strickland* was  
 20 unreasonable under § 2254(d) is all the more difficult. The standards  
 21 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at  
 22 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117  
 23 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in  
 24 tandem, review is “doubly” so, *Knowles*, 556 U.S. at \_\_\_, 129 S.Ct. at  
 25 1420. The *Strickland* standard is a general one, so the range of  
 26 reasonable applications is substantial. 556 U.S. at \_\_\_, 129 S.Ct. at  
 1420. Federal habeas courts must guard against the danger of equating  
 unreasonableness under *Strickland* with unreasonableness under §  
 2254(d). When § 2254(d) applies, the question is whether there is any  
 reasonable argument that counsel satisfied *Strickland*’s deferential  
 standard.

1 *Harrington v. Richter*, 131 S.Ct. at 788. “A court considering a claim of ineffective assistance of  
2 counsel must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’  
3 of reasonable professional assistance.” *Id.* at 787 (quoting *Strickland*, 466 U.S. at 689). “The  
4 question is whether an attorney’s representation amounted to incompetence under prevailing  
5 professional norms, not whether it deviated from best practices or most common custom.” *Id.*  
6 (internal quotations and citations omitted).

7 In the instant case, petitioner argues that he was prejudiced by his trial counsel’s failure to  
8 present Dr. Racoma’s expert testimony because his testimony would have “confirmed Dr. Vergara’s  
9 testimony that a person with ODD has a tendency to lie” and that he would have testified that the  
10 victim “suffered with ODD and that, due to the illness, he would have a greater tendency to lie than a  
11 child without the illness.” (ECF No. 44, at p. 43). Petitioner’s argument lacks merit. That Dr.  
12 Racoma could have confirmed Dr. Vergara’s testimony that a person with ODD may have an  
13 increased tendency to lie is of little significance, because such testimony would have been  
14 cumulative. (*See* Exhibit 50, at p. 151) (cross-examination of Dr. Vergara). While petitioner might  
15 have used Dr. Racoma’s ODD diagnosis and testimony concerning the victim’s medication to  
16 challenge the victim’s credibility, such a challenge would have little weight, given the evidence  
17 corroborating the victim’s testimony. Additionally, such a challenge would have little weight, given  
18 Dr. Racoma’s admission that he never observed the victim to be untruthful (Exhibit 144, at p. 24),  
19 that the purpose of his visits with the victim had nothing to do with whether the victim was truthful  
20 (*id.*), that he could not opine whether the victim had lied in this case (*id.*, at p. 50), and that he had  
21 never encountered a person with ODD to have fabricated an instance of sexual assault (*id.*, at p. 51).  
22 Petitioner has not met the prejudice prong of the *Strickland* standard, because he has not established  
23 a reasonable probability that, if Dr. Racoma had testified at trial, the result of the trial would have  
24 been different. *Strickland*, 466 U.S. at 687. Petitioner has failed to meet his burden of proving that  
25 the Nevada Supreme Court’s ruling was contrary to, or involved an unreasonable application of,  
26 clearly established federal law, as determined by the United States Supreme Court, or that the ruling

1 was based on an unreasonable determination of the facts in light of the evidence presented in the  
2 state court proceeding. This Court denies federal habeas relief on Ground Five of the amended  
3 petition.

#### 4 **V. Certificate of Appealability**

5 District courts are required to rule on the certificate of appealability in the order disposing of  
6 a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and  
7 request for certificate of appealability to be filed. Rule 11(a). In order to proceed with his appeal,  
8 petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup>  
9 Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v.*  
10 *Mikels*, 236 F.3d 550, 551-52 (9<sup>th</sup> Cir. 2001). Generally, a petitioner must make “a substantial  
11 showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C.  
12 § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate  
13 that reasonable jurists would find the district court's assessment of the constitutional claims  
14 debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry,  
15 the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason;  
16 that a court could resolve the issues differently; or that the questions are adequate to deserve  
17 encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this Court's  
18 denial of the petition debatable or wrong. The Court therefore denies petitioner a certificate of  
19 appealability.

#### 20 **VI. Conclusion**

21 **IT IS THEREFORE ORDERED** that petitioner's motion for reconsideration (ECF No. 78)  
22 of the Court's dismissal of Ground Six as procedurally barred is **DENIED**.

23 **IT IS FURTHER ORDERED** that the remaining grounds of the amended petition for a writ  
24 of habeas corpus are **DENIED**.

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26 ///

1           **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
2 **APPEALABILITY.**

3  
4           **IT IS FURTHER ORDERED** that the Clerk of Court **SHALL ENTER JUDGMENT**  
5 **ACCORDINGLY.**

6           DATED this 28th day of March, 2014.

7  
8   
9 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE